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Department of the Treasury

Washington, DC 20224

Third Party Communication: None

Date of Communication: Not Applicable

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:PSI:B04

PLR-123443-10

Date:

November 29, 2010

In Re:

Legend

Decedent	=
Spouse	=
Date 1	=
Date 2	=
Date 3	=
Trust	=

Dear :

This letter responds to your authorized representative's letter of May 12, 2010, requesting a ruling that, pursuant to Rev. Proc. 2001-38, 2001-2 C.B. 124, the qualified terminable interest property (QTIP) election made with respect to the Family Trust is a nullity for federal gift, estate and generation-skipping (GST) transfer tax purposes.

The facts and representations submitted are as follows: Decedent died on Date 1 survived by Spouse. Decedent established Trust, a revocable living trust on Date 2, which was restated it in its entirety on Date 3. Spouse was executor of Decedent's estate.

Article Seven, Section 7.01 of Trust provides that if Spouse survives Decedent, the trustee shall divide the remaining trust property into two separate shares to be designated as the Marital Share (which becomes Marital Trust) and the Family Share (which becomes Family Trust). Article Seven, Section 7.02 provides that the Marital Share will be a fractional share. The numerator of the fraction is equal to the unlimited federal estate tax marital deduction allowable to Decedent's estate reduced by the value, for federal estate tax purposes, of any interest in property that qualifies for the federal estate tax marital deduction and that passes or has passed from Decedent to

Spouse other than under the terms of Article Seven. The numerator is further reduced by the amount of Decedent's estate that is not taxable by reason of the unified credit amount and state death tax credit, taking into account any taxable gifts and any other federal estate tax deductions as finally determined for estate tax purposes. The denominator consists of the remaining trust property as finally determined for federal estate tax purposes.

Article Seven, Section 7.03 provides that the balance of the trust property will be allocated to the Family Share.

Article Eight, Section 8.01 directs the trustee to distribute to, or apply for the sole benefit of, Decedent's wife all of the income of the Marital Trust not less frequently than quarterly. Section 8.02 directs the trustee to distribute to, or for the benefit of, Spouse as much of the principal of the Marital Trust as Spouse may request in writing for any reason.

Article Eight, Section 8.04 provides that upon the death of Spouse, the trustee will distribute all or any portion of the principal and any accrued and undistributed income of the Marital Trust to any person or persons, or to any entities as Spouse directs by will, living trust, or other written instrument that refers to this power of appointment

Article Nine, Section 9.01 directs that during Spouse's lifetime, the trustee is to pay to, or apply for the benefit of, Spouse all the net income from the Family Trust at least monthly. Section 9.03 provides that the trustee will distribute to, or for the benefit of, Spouse as much of the principal as the trustee considers necessary for her health, education, maintenance and support. Section 9.06 provides that the Family Trust terminates at the death of Spouse. Article 10 provides that any undistributed trust property on the death of Spouse will be distributed to trusts for the benefit of Decedent's descendants.

The executor of Decedent's estate timely filed a Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return. On Schedule M of Form 706, the executor listed the assets of the Family Trust. By listing all the assets of the Family Trust on Schedule M, the executor made a QTIP election with respect to those assets. With the aid of new counsel, Spouse discovered that the QTIP election for the Family Trust was not necessary to reduce the estate tax liability to zero.

You request a ruling that, pursuant to Rev. Proc. 2001-38, 2001 C.B. 124, the QTIP election made with respect to the Family Trust on Form 706 be treated in its entirety as null and void for purposes of §§ 2044(a), 2056(b)(7), 2519(a), and 2652, where the election was not necessary to reduce the estate tax liability to zero.

LAW AND ANALYSIS

Section 2001(a) of the Internal Revenue Code imposes a tax on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.

Section 2056(a) provides that, except as limited by § 2056(b), the value of the taxable estate is to be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property that passes or has passed from the decedent to the surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate. Section 2056(b)(1) provides the general rule that a marital deduction is not allowed for an interest passing to the surviving spouse that is a "terminable interest." An interest is a terminable interest if the interest passing to the surviving spouse will terminate or fail on the lapse of time or on the occurrence of an event or contingency or on the failure of an event or contingency to occur and, on termination, an interest in the property passes to someone other than the surviving spouse.

Section 2056(b)(7) provides an exception to this terminable interest rule in the case of QTIP. For purposes of § 2056(a), QTIP is treated as passing to the surviving spouse, and no part of the property is treated as passing to any person other than the surviving spouse. Under § 2056(b)(7)(B)(i), QTIP is property which passes from the decedent, in which the surviving spouse has a qualifying income interest for life, and to which an election under § 2056(b)(7)(B)(v) applies.

Section 2056(b)(7)(B)(v) provides that the election to treat property as QTIP under § 2056(b)(7) is made by the executor on the return of tax imposed by § 2001. The election, once made, is irrevocable.

Section 2044 provides that the value of the gross estate includes the value of any property in which the decedent had a qualifying income interest for life and with respect to which a deduction was allowed for the transfer of the property to the decedent under § 2056(b)(7).

Section 2519(a) and (b) provide that any disposition of all or part of a qualifying income interest for life in any property with respect to which a deduction was allowed under § 2056(b)(7) is treated as a transfer of all interests in the property other than the qualifying income interest.

Section 2652(a) provides that, in the case of property subject to an election under § 2056(b)(7), the surviving spouse will be treated as the transferor of the property for generation-skipping transfer tax purposes in the absence of a "reverse QTIP" election under § 2652(a)(3).

In general, under Rev. Proc. 2001-38, a QTIP election under § 2056(b)(7) will be treated as null and void for purposes of §§ 2044(a), 2056(b)(7), 2519(a), and 2652, where the election was not necessary to reduce the estate tax liability to zero, based on values as finally determined for federal estate tax purposes. The revenue procedure provides an example where a QTIP election was made when the taxable estate (before allowance of the marital deduction) was less than the applicable exclusion amount under § 2010(c). Another example set forth in the revenue procedure is where the decedent's will provides for a "credit shelter trust" to be funded with an amount equal to the applicable exclusion amount under § 2010(c), with the balance of the estate passing to a marital trust intended to qualify under § 2056(b)(7). The estate makes QTIP elections with respect to both the credit shelter trust and the marital trust. The QTIP election for the credit shelter trust was not necessary, because no estate tax would have been imposed whether or not the QTIP election was made for that trust. See Rev. Proc. 2001-38, section 2.

In this case, after funding the Marital Trust, the QTIP election made for the Family Trust was not necessary to reduce the estate tax liability to zero because no estate tax liability would have been imposed whether or not the election was made. No QTIP election was necessary with respect to the Marital Trust because those bequests qualify for the marital deduction under § 2056(b)(5). After applying the unified credit amount under § 2010, the estate's federal estate tax liability is reduced to zero. Consequently, we rule that the QTIP election made for the Family Trust is null and void for purposes of §§ 2044, 2056(b)(7), 2519 and 2652. The property held in the Family Trust will not be includible in the gross estate of Spouse under § 2044, and Spouse will not be treated as making a gift under § 2519 if Spouse disposes of the income interest with respect to that property. Further, Spouse will not be treated as the transferor of the property in the Family Trust for generation-skipping transfer tax purposes under § 2652.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. In addition, we express or imply no opinion regarding the value of the property transferred to the trusts.

The ruling contained in this letter is based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for the ruling, it is subject to verification on examination. This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

The estate and generation-skipping transfer tax rulings in this letter apply only to the extent that the relevant sections of the Internal Revenue Code are in effect during the period at issue.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

James F. Hogan
Chief, Branch 4
Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures

Copy for section 6110 purposes

cc: